1982

Free Speech or Economic Weapon? The Persisting Problem of Picketing

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SUFFOLK UNIVERSITY
LAW REVIEW

Volume XVI Winter 1982 Number 4

FREE SPEECH OR ECONOMIC WEAPON? THE PERSISTING PROBLEM OF PICKETING*

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I. INTRODUCTION

A young woman walks briskly along a crowded street in downtown Boston. She has just won her first jury trial, her spirits are buoyant, and she has decided to treat herself by buying the elegant pair of shoes she has spied in the window of her favorite boutique. As she approaches the store, she notices two small and wizened old men slowly circling on the sidewalk in front of the entrance. Each has a large "sandwich board" draped over his shoulders which proclaims in big red letters:

UNFAIR!
Shoemakers Local 100 on Strike
Against Fashion Manufacturers.
Their Shoes Are on Sale Here.
Help Us! Don't Buy Scab Goods!

The young woman's momentum has almost carried her through the doorway when her eyes meet those of one of the pickets. She pauses, winces, shrugs, and turns away. What has happened?

There are several possible explanations. The would-be customer may have felt physically threatened, but that hardly seems to fit the facts. Fear would have been much more plausible had the customer been a frail, elderly person, and the pickets six brawny fellows looking like extras out of *On the Waterfront*, all brandishing placards on heavy sticks. Another possibility is that the young woman may have become intellectually enamored of the labor movement while in college through her introduction to the classic studies of unionism by

* This article was delivered as the fifth Donahue Lecture at Suffolk University Law School on March 4, 1982.

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Beatrice and Sidney Webb[1] and John R. Commons,[2] and so was prepared to honor any picket line as a matter of principle. Or, for the quite different reason that she was a first-generation college graduate who came from a working class family with strong union roots, she may have been prepared to honor any picket line, again as a matter of principle. Or instead she may have been an alert, disinterested member of the public who had read a good deal about the dispute between Shoemakers Local 100 and Fashion Manufacturers, and had concluded that the employees were in the right in this particular case. Finally, the young woman may have simply wished to avoid an unpleasant human encounter, and therefore shrank from a head-on confrontation with the pickets.

Legally, the situation can be viewed from various perspectives. First, the young woman must be protected against physical coercion. Second, because society has accepted the right of employees to organize and engage in collective bargaining, it should be prepared to recognize the ancillary right of unions such as Shoemakers Local 100 to take certain steps which are reasonably calculated to achieve those legitimate objectives.[3] At a minimum, this would seem to mean that Shoemakers Local 100 could appeal directly to the employees of Fashion Manufacturers to support it in its efforts to secure recognition and bargaining rights through a peaceful strike. If necessary for effective organizing, Shoemakers Local 100 should also be able to enlist the help of other sympathetic groups of employees or individual members of the public.

At the same time, however, Fashion Manufacturers itself, retail stores such as the boutique handling Fashion Manufacturers products, their employees and customers, and the general public are all entitled to be free from undue business disruptions and any other excessive economic pressures. In the case of the embattled Fashion Manufacturers, this may mean freedom from some or all of the pressures emanating from outside its own workplace. In the case of the other parties, this may mean freedom from some or all of the pres-

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[1] *See generally* S. WEBB & B. WEBB, INDUSTRIAL DEMOCRACY (1920); S. WEBB & B. WEBB, THE HISTORY OF TRADE UNIONISM (1920).

[2] *See generally* J. COMMONS, HISTORY OF LABOR IN THE UNITED STATES (1935).

[3] *See* 29 U.S.C. §§ 157, 163 (1976) (employees have right to organize and to strike). Section 7 of the amended National Labor Relations Act guarantees most employees of private employers in industries which affect commerce "the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157. Section 13 expressly ensures the "right to strike" "except as specifically provided for herein." National Labor Relations Act of 1935, 49 Stat. 449, 452, 457, *amended by* Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, Pub. L. No. 101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 157, 163 (1976)).

sures which threaten to enmesh them in a dispute about which they have little or no direct concern. Striking the appropriate balance between all these competing interests is the principal function of the excruciatingly difficult body of law regulating so-called "secondary boycotts." That will be discussed more fully later.[4]

Let us return to the young woman who has decided to respect the picket line and forgo her intended purchase of Fashion Manufacturers shoes. Just as it is indisputable that the law should guarantee her right to make that purchase without fear of physical compulsion, I think it is indisputable that the law should guarantee her right to refrain from that purchase, at least as long as she acts as an individual member of the consuming public, for whatever reasons are sufficient to her personally. That brings us to the critical issue of the legal status of picketing. Should it make any difference that the young woman acted in response to a placard carried by two men stationed at a store entrance, rather than in response to a newspaper story, a telephone call from a friend, a paid advertisement, or even a handbill distributed by the same two men in front of the same retail shop?

"Peaceful picketing," the United States Supreme Court has said, "is the workingman's means of communication."[5] One line of analysis is that, as a means of communication, picketing is free speech and is therefore entitled to every constitutional protection afforded other forms of expression. This means that it cannot be subjected to special restrictions, such as antiboycott curbs, simply because it is picketing. The opposing line of analysis is that picketing is not simply speech; it is "speech plus." The "plus" element removes picketing from the realm of pure speech and enables it to be regulated in ways that the Constitution would not tolerate for other forms of communication. The rest of this article will seek to determine which of those two analyses better reconciles constitutional theory and the realities of picketing.

II. HISTORICAL DEVELOPMENT: ILLEGAL ENDS AND IMPROPER MEANS

A. Thornhill: *"Clear and Present Danger" and* Giboney: *"Illegal Ends"*

The case that has become synonymous with the concept that picketing is constitutionally protected free speech is *Thornhill v. Alabama*.[6] In striking down a state antipicketing statute, Justice Mur-

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[4] *See infra* notes 46-51 and accompanying text.

[5] Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

[6] 310 U.S. 88 (1940).

phy declared for the Supreme Court that an abridgment of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[7] That test plainly echoes the venerable rule governing all forms of expression enunciated by Justice Holmes in *Schenck v. United States*:[8] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[9]

Despite the sweeping language of *Thornhill*, and its apparent equation of picketing with free speech, the holding was actually a narrow one. The Alabama courts were prepared to apply a criminal statute to prohibit a single individual from patrolling peacefully in front of an employer's establishment carrying a sign stating truthfully that the employer did not employ union labor.[10] Because the statute provided for no exceptions, the Supreme Court held it invalid on its face.[11]

The most definitive statement the Supreme Court has made on the constitutionally allowable limitations on picketing may have been its unanimous decision in *Giboney v. Empire Storage & Ice Co.*[12] There the Court sustained a state court injunction against peaceful picketing whose "sole, unlawful immediate objective" was to induce wholesale distributors to agree with a union not to sell ice to nonunion peddlers.[13] This effort was in violation of a state statute forbidding combinations in restraint of trade.[14] Because the validity of the state antitrust legislation was accepted, it was an easy step to conclude that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control."[15]

So too, Bonnie and Clyde's oral instructions to their confederates

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[7] *Id.* at 104-05.

[8] 249 U.S. 47 (1919).

[9] *Id.* at 52; *cf.* Dennis v. United States, 341 U.S. 494, 510 (1951) (quoting with approval Judge Learned Hand's inquiry "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger").

[10] *See* 310 U.S. at 91-92, 91 n.1 (quoting anti-picketing statute and discussing lower court history of case).

[11] *Id.* at 101, 105.

[12] 336 U.S. 490 (1949).

[13] *Id.* at 502.

[14] *Id.* at 495.

[15] *Id.* at 502.

may have been speech in the most conventional sense. Nevertheless, as long as they were in furtherance of a conspiracy to rob a bank, they would not be immune from the regulatory power of government.[16] With *Giboney* as the touchstone, the critical factor became the end pursued rather than the means employed. If the end is unlawful, picketing or any other form of expression in direct furtherance of it can be restricted. If the end, for example a customer's refraining from making a particular purchase, is lawful and cannot constitutionally be declared unlawful, then under this view peaceful picketing, and any other form of expression in furtherance of it, cannot constitutionally be forbidden.

As a general approach, this is hardly a novel theory. Over twenty-five years ago, Professor Edgar A. Jones, Jr. of the University of California at Los Angeles stated: "Picketing, like any other speech, is protected by the Constitution—as a *means;* however, like other speech, it will not be protected when used for the purpose of accomplishing an unlawful *end.*"[17] The soundness of this analysis can be tested by asking whether a court would have decided differently any case in which a ban on peaceful picketing was upheld had the ban applied to any other type of communication, at the same time and place as the message conveyed by the pickets.

In certain situations, of course, picketing might present a clear and present danger that a substantive evil would occur, while an oral or written communication delivered far from the scene or phrased in abstract terms might not. But that is arguably a mere function of the time, place and specificity of the message conveyed by the picketing (including any peculiar significance attached to it by prearrangement among a particular group) rather than something inherent in the nature of the conduct itself. Any other type of speech or advocacy might likewise create or not create a clear and present danger which can be declared unlawful, depending on its tendency to generate certain proscribed behavior.[18] Until 1980, every

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[16] *See, e.g.,* Fox v. Washington, 236 U.S. 273, 277 (1915) (statute condemning speech which encourages violations of law constitutionally permissible).

[17] Jones, *Free Speech: Pickets on the Grass, Alas! — Amidst Confusion, A Constant Principle,* 29 S. CAL. L. REV. 137, 157 (1956); *see also* Jones, *The Right to Picket—Twilight Zone of the Constitution,* 102 U. PA. L. REV. 995, 1028 (1954). For a vigorous exposition of the contrary point of view, see C. GREGORY & H. KATZ, LABOR AND THE LAW 289-329 (3d ed. 1979).

[18] *Compare* Dennis v. United States, 341 U.S. 494 (1951) (statute can prohibit advocating forcible overthrow of government when existence of conspiracy creates danger of action) *with* Yates v. United States, 354 U.S. 298 (1957) (statute prohibiting advocacy of overthrow of government was limited to advocacy of specific acts and did not cover advocacy of overthrow as abstract doctrine). *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911) (on the status of unfair list used to "signal"

Supreme Court holding regarding the status of picketing subsequent to *Thornhill* and *Giboney* can be explained under the "clear danger" and "unlawful objectives" standards of those decisions, in spite of occasional language that suggests otherwise.[19]

B. *Characterization of Objectives*

In several cases in which the Supreme Court has sustained a ban on peaceful picketing, the unlawful end or substantive evil proscribed by governmental authority was the "exertion of *concerted* pressure"[20] by employees, typically acting subject to union discipline or loyalties, to compel a person to do an act that a constitutionally valid public policy has declared should be left to his voluntary determination.[21] The picketing was either "a signal in the nature of an order to the members of the affiliated unions"[22] or a "bare instigation"[23] by organized employees to force the person to take the action desired by the union.[24] An example is picketing aimed at the enlistment of union deliverymen and union patrons to force a self-employed entrepreneur to abide by union working conditions.[25] In other cases the act which the union wanted someone to perform was

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boycott by unionized employees acting in concert); *cf.* Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 601 (1951) ("the Court cannot long distinguish between the picket line and the unfair list").

[19] The results in these picketing cases were not all necessarily sound. In several instances the Supreme Court viewed the factual situation differently from the way I think it should have been viewed. But this does not affect my contention that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there was undeviating decisional consistency for forty years following *Thornhill v. Alabama* on the constitutional status of picketing.

[20] Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722, 726 (1942) (emphasis supplied).

[21] *See, e.g., id.* at 726-28.

[22] *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 678 (1951) (unfair to permit union to order picket against general contractor to fire nonunion subcontractor).

[23] *See* IBEW Local 501 v. NLRB, 341 U.S. 694, 701, 704 (1951).

[24] *See supra* notes 20-23. The cases cited in notes 20 through 23 may be characterized as involving secondary boycotts. A "neutral" or "secondary" party was being pressured by a combination of employees to cease doing business with a "primary party" — the real object of the union's grievance. In Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950), the picketers sought to get union drivers and customers to compel a self-employer to accept union standards. *Id.* at 471-72. In every instance someone had a special interest of sufficient value—his status as a supposed "neutral" or as an independent sole entrepreneur—that the Court felt government could, within the strictures of the Constitution, protect him against being forced to relinquish it by a combination of employees responding to group discipline.

[25] *See* Teamsters Local 309 v. Hanke, 339 U.S. 470, 472 (1950); *supra* note 24 (describing circumstances of *Teamsters Local 309*).

itself deemed unlawful, as in *Giboney*. For instance, the object of the picketing might be to compel the employer to engage in racial discrimination or to commit an unfair labor practice against its own employees.[26] In those circumstances even a direct, noncoercive inducement of the act could presumably have been prohibited.

The Achilles heel of the "unlawful objectives" test is that it enables a willing judiciary to rationalize almost any restriction on picketing by a hasty acceptance of a governmental characterization of the purpose of the picketing as illegal. Some members of the Supreme Court thought this occurred in *Teamsters Local 695 v. Vogt, Inc.*[27] In that case, a 5-3 majority upheld a state court injunction against peaceful organizational picketing on the grounds that the purpose of the picketing was to coerce the employer to force its employees to join the union.[28] Carried to its logical conclusion, that approach could be used to justify the prohibition of almost any organizational picketing and thereby overrule *Thornhill*. Perhaps the Court found it significant that the employer in *Vogt* was a gravel pit, where the primary addressees of the pickets were unionized truckers and not individual consumers acting on their own.

In any event, in the forty years following *Thornhill*, whenever the Supreme Court dealt with peaceful picketing which sought the performance of a lawful act by the immediate or ultimate target of the picketing, uncoerced by organized employees or a group acting in concert, it consistently sustained the constitutional right of the picketers "to advise customers and prospective customers . . . and thereby to induce such customers not to patronize" the target businesses.[29] Toward the end of the Warren Court years, Justice Mar-

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[26] *See* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 285-86 (1957) (picketing to have employer force his employees to join a union); Plumbers Local 10 v. Graham, 345 U.S. 192, 194-95 (1953) (picketing to have employer require union membership as condition of employment, in violation of state right-to-work law); Building Serv. Employees Local 262 v. Gazzam, 339 U.S. 532, 533-34 (1950) (picketing to have employer force his employees to join union, contrary to state statute forbidding such employer coercion); Hughes v. Superior Court, 339 U.S. 460, 461-62 (1950) (picketing to have employer practice racial discrimination, contrary to state policy).

[27] 354 U.S. 284 (1957).

[28] *Id.* at 295.

[29] Thornhill v. Alabama, 310 U.S. at 99; *see also* Teamsters Local 795 v. Newell, 356 U.S. 341, 341 (1958) (jurisdiction of NLRB not limited to employer-employee situations), *rev'g per curiam*, 181 Kan. 898, 317 P.2d 817 (1957); Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 294-96 (1943) (workmen can peacefully picket in public though not employed by target of picket); Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 772-75 (1942) (nonemployee union may picket business); AFL v. Swing, 312 U.S. 321, 325-26 (1941) (first amendment does not limit allowable picketing to situations between employer and employees); *cf.* NLRB v. Fruit & Vegetable Packers Local 760 [Tree Fruits], 377 U.S. 58, 63 (1964) (allows

shall summed up the teachings of the Supreme Court by declaring that the cases in which picketing bans had been approved "involved picketing that was found either to have been directed at an illegal end . . . or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice."[30]

C. *Speech "Plus"*

Inevitably, in a discussion about picketing, the point is reached where someone asks: "Does it really make sense to put the carrying of signs on sticks in the same first amendment category with the sort of utterance by a Sam Adams or a Patrick Henry or a John Peter Zenger?" This question relates to the so-called "plus" element in picketing, which causes picketing to be treated differently from other modes of expression under the Constitution. Justice Douglas has commented: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[31] As a form of physical activity, naturally, picketing

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peaceful consumer picketing at secondary sites).

[30] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 314 (1968). The dictum was voiced in an opinion in which a majority of the Court likened a large commercial shopping center to a conventional municipal business block, and held that union picketing of a nonunion retailer there was protected under the first amendment. *Id.* at 324-25. The *location* of the picketing in *Logan* was the critical issue, not the content of the message. *Id.* at 323-24. The decision represented an extension of the fairly narrow doctrine that private parties exercising certain "public functions" may be treated as if they were state agencies and thus may be subject to constitutional limitations. *Cf.* Marsh v. Alabama, 326 U.S. 501, 508-10 (1948) (company town cannot forbid distribution of religious literature). *Logan* was expressly overruled in Hudgens v. NLRB, 424 U.S. 507, 518 (1976), which held that first amendment guarantees were not applicable to union picketing of a retail store in a privately owned, enclosed shopping mall. *Id.* at 520-21. That, of course, did not necessarily invalidate Justice Marshall's dictum concerning the substantive elements of a constitutionally protected message when conveyed by picketing.

[31] Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 776 (1942) (Douglas, J., concurring). An even stronger statement is found in Justice Goldberg's opinion for the Court in Cox v. Louisiana, 379 U.S. 536 (1965). "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Id.* at 555; *see also* International Bhd. of Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 289-90 (1957) (state may enjoin peaceful picketing of business entrance which discourages business and has purpose of coercing employer to compel employees to join union).

may be subject to trespass laws[32] and to reasonable rules governing the use of public streets, in short, to the well recognized content-neutral regulation of the time, place, or manner of expression.[33] The same would be true of any assemblage of persons listening to a speech in the courthouse square, or engaging in a parade or other popular demonstration. Furthermore, violent picketing or picketing (like other utterances) "in a context of violence" has been held subject to prohibition.[34] None of this, however, has much to do with picketing as a peaceful means of communication.

If picketing induces action without respect to the nature of the ideas communicated, it is either because the conduct engenders physical fear or a psychological reflex in the viewer, or because it serves as a signal to trigger certain activity agreed upon beforehand or accepted as conventional by picketer and viewer. Coercive picketing is simply not typical of the kind of picketing with which this discussion is concerned.[35] On the other hand, if the actions or the gestures of the pickets can properly be classified as physically threatening or intimidating, then there is a problem in the law of assault, not of the first amendment. Where picketing is a signal it

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[32] *E.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978). State courts may be able to apply local trespass laws even to picketing that is "arguably protected" under the National Labor Relations Act. *Id.* at 205.

[33] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (government cannot selectively restrict certain kinds of speech, such as drive-in movies showing nudity, on grounds of offensiveness); Cox v. Louisiana, 379 U.S. 536, 559, 562 (1965) (free speech protections do not allow infringing public order by courthouse picketing); Cox v. Louisiana, 379 U.S. 536, 554 (1965); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (statute forbidding sound trucks does not restrict free speech); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (regulating parades). The Supreme Court will generally strike down even time-place-manner regulation, however, if it discriminates on the basis of the content of the communication. *E.g.*, Carey v. Brown, 447 U.S. 455, 470 (1980); Erznoznik v. City of Jacksonville, 422 U.S. at 209; Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 98 (1972). *See generally* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1501-03 (1970). The ultimate inadequacy of the Court's dichotomy of "pure speech/speech plus" in analyzing protest speech is neatly pinned down in Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1.

> [A]ll speech is necessarily "speech plus." If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter. . . . [I]n any theory, speech has always been dependent on some commitment to order and etiquette. There is, therefore, nothing novel in the vulnerability of protest speech to regulation on this score.

Id. at 23.

[34] Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941).

[35] *See generally* Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513, 518 n.11 (1943); Jones, *Picketing and Coercion: A Reply*, 39 VA. L. REV. 1063, 1065 (1953).

would seem to be such only by designation and not by inherent quality. An unfair list,[36] a red flag, a telephone call, or some other kind of notice[37] could also be so designated.[38]

Conversely, picketing has no univocal meaning. It may, for instance, be aimed only at enlisting consumer, and not employee, assistance.[39] It may, indeed, have nothing to do with a labor dispute at all but rather be the instrument for a concerned group to protest segregation[40] or cuts in welfare payments, or for a religious group to protest objectionable motion pictures. In every case we are driven back to evaluating the ends sought by the picketing (or other appeal). Is the person addressed being asked to engage in illegal conduct or to induce someone else to engage in illegal conduct? To concentrate solely on the means whereby the signal or message is transmitted serves only to becloud the issue.

Perhaps the most powerful objection to picketing's claims as protected speech is that it involves no intellectual appeal, no exchange of ideas. It is mere sloganeering, or subtle psychological manipulation (or not so subtle psychological arm twisting), or a combination of the two. There is truth in that description, but I do not think it goes to the essence of the activity. The first amendment was intended to cover more than the elegant periods of our Abraham Lincolns and Woodrow Wilsons. At worst, the cries "Unfair," "Scabs," and "Do Not Patronize" call for no more of a Pavlovian response than the gaudy bumper stickers which urge readers to "Vote Democratic" and "Vote Republican," or than such ancient political battle cries as "Tippecanoe and Tyler too" and "54° 40' or Fight," not to mention the nastiness of "Rum, Romanism, and Rebellion."[41] This is all part of our heritage of "uninhibited, robust, and wide-open"[42] public discourse.

Furthermore, while one can sympathize with those who resent being accosted by strangers with peremptory demands, or being forced

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[36] *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911).

[37] *Cf.* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 678 (1951) (union ordered placing of picket to notify union members to leave job).

[38] *See also supra* note 18.

[39] *See* NLRB v. Fruit and Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 61 n.5 (1964); NLRB v. Crowley's Milk Co., 208 F.2d 444 (3d Cir. 1953).

[40] *Cf.* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982) (black boycott of white merchants).

[41] *See generally,* ENCYCLOPEDIA OF AMERICAN HISTORY 218, 227, 308 (R. Morris ed. 1976).

[42] New York Times v. Sullivan, 376 U.S. 254, 270 (1964); *see* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) ("The language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact.").

to make decisions under the gaze of a beady pair of eyes, on balance, the existence of such mildly discomfiting social pressures should not outweigh the speaker's right to deliver the message in person.[43] We must deal with such human encounters daily on our public streets, from the religious proselytizer who distributes literature[44] to the political candidate who approaches with an outstretched hand. True, crossing a picket line might seem more hostile than rejecting a proffered leaflet or handshake, but this is a matter of immaterial degree. At any rate, once physical fear is set aside, there is no basis for a constitutional distinction between the handbiller and the picketer. Each has the capacity to confront us with an accusing pair of eyes.

This does not mean that picketing for a certain object may not be outlawed unless every other method of achieving the object is also forbidden. Undoubtedly government may, as the Supreme Court has declared, "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."[45] Nevertheless, if the object or mes-

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[43] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (racially integrated community organization accused real estate agent of "blockbusting" and distributed leaflets near his home in effort to force him to change his practices). Thus, the Supreme Court has recognized that peaceful pamphleteering may be protected by the first amendment even though the handbillers are "offensive" and intend in some sense a "coercive impact" on the target of their leaflets. *Id.* Arguably the ultimate example of a personally delivered and offensively worded peremptory demand was presented by the young man who, during the Vietnam era, donned a jacket with the plainly visible words, "F-— the Draft," and sauntered about in such public places as the county courthouse. Despite this flaunting of the inscription in a way hardly different from the usual "sandwich-type" picket sign, Justice Harlan for the Court declared: "The only 'conduct' which the State sought to punish is the *fact of communication.*" Cohen v. California, 403 U.S. 15, 18 (1971) (emphasis supplied). A conviction for disturbing the peace by "offensive conduct" was reversed. *Id.* at 26; *see also* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3424 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

[44] *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939) (distributing printed materials on street permissible); Lovell v. Griffin, 303 U.S. 444 (1938) (freedom of press and speech includes distribution of religious pamphlets); *cf.* Martin v. Struthers, 319 U.S. 141 (1943) (ban on residential solicitation invalid as applied to Jehovah's Witnesses).

[45] Hughes v. Superior Court, 339 U.S. 460, 468 (1950). Some language of Justice Frankfurter's opinion in *Hughes* is at odds with this author's thesis, in that it suggests there *is* a compulsive quality inherent in picketing which makes it peculiarly vulnerable to restriction. *Id.* Yet elsewhere the opinion states that picketing is subject to government control if "the purpose which it seeks to effectuate gives ground for its disallowance," thereby placing the case squarely within the rationale of *Giboney. See id.* at 465-66. The Supreme Court of California, whose judgment was affirmed in *Hughes,* had declared expressly that the picketing could be enjoined because it was for the "specific unlawful purpose" of compelling an employer to adopt a racial quota

sage of the picketing is constitutionally beyond the reach of the legislature, so too is peaceful, orderly picketing to secure the object or spread the message. Surely different treatment would not be warranted just because picketing may be the most visible and efficacious way for working people to get their message across to their intended audience at the crucial moment of decision.[46]

III. Consumer Boycotts and Individual Appeals

A. *Through* Tree Fruits *and* Mosley

It is commonplace in Anglo-American jurisprudence that acts innocent in themselves may become illegal if done in concert or pursuant to an agreement.[47] The individual employee who is not subject to a term contract may quit work with impunity.[48] Yet in the early nineteenth century it was a criminal conspiracy for a group of workers to band together and refuse as a unit to perform services for their employer.[49] Even today our society does not hesitate to prohibit strikes or concerted work stoppages on the part of most public sector employees[50] and on the part of private sector employees under certain circumstances,[51] even though it would be almost un-

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in his hiring, contrary to the state's antidiscriminatory public policy. 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948). Justices Black, Minton, and Reed concurred in *Hughes* solely on the basis that *Giboney* controlled. 339 U.S. at 469 (Black, Minton, Reed, JJ., concurring). Justice Douglas did not participate.

[46] *Cf.* Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 775 (1942) (Douglas, J., concurring) (querying whether a state "can prohibit picketing when it is effective but may not prohibit it when it is ineffective").

[47] *See* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3436 (1982). Speaking for the Court, Justice Stevens observed: "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity." *Id.; cf.* Krulewitch v. United States, 336 U.S. 440, 448 (1949) (Jackson, J., concurring) (" 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance").

[48] H. Wood, Law of Master and Servant 272-73 (1877); Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 124-25 (1976).

[49] *E.g.*, Commonwealth v. Pullis [Philadelphia Cordwainers] (Phil. Mayor's Ct. 1806), in 3 Doc. Hist. Am. Ind. Soc. 59 (J. Commons 2d ed. 1910); *see also* Vegelahn v. Guntner, 167 Mass. 92, 97, 44 N.E. 1077, 1077 (1896) (civil conspiracy when two men patrol place of business to prevent workmen from entering).

[50] *See* H. Edwards, R. Clark & C. Craver, Labor Relations Law in the Public Sector 567, 572 (1979) (noting that as of 1979, only about eight or nine states gave any of their employees even a limited right to strike).

[51] *See, e.g.*, Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-144, 151-167, 171-183, 557 (1976) (in §§ 176-180, Act authorizes 80-day federal injunction against so-called national emergency strikes that would imperil national health or safety); *see also infra* notes 53-59 and accompanying text ("secondary" strikes are also forbidden).

thinkable to outlaw individual refusals to work by those same employees. A healthy instinct is in evidence here. We have an abiding fear of both the mob and the regimented group, and of the way their unleashed forces can crush the solitary object of their wrath. Over time, however, we have become more sophisticated in our assessments of relative strengths, and now we know that certain persons—rank-and-file workers and racial minorities—may need the sustenance of the group if they are to achieve a measure of equality in dealing with their employers and the community.[52] Much of our modern labor and social legislation is grounded on that premise.

Nowhere has the effort to achieve an appropriate balance of power between individuals and groups in the labor field caused more difficulty than in the regulation of the secondary boycott. To return to the opening hypothetical, the shoe manufacturer, Fashion Footwear, would be referred to as the *primary* party, because it is the employer directly involved in the labor dispute with Shoemakers Local 100. Retail distributors of Fashion Manufacturers' products, such as the boutique where the young woman intended to buy the shoes, would be considered neutral or *secondary* parties because they have no personal stake in the outcome of the dispute. Under the Taft-Hartley Act of 1947,[53] unions were forbidden to engage in secondary boycotts by causing employees of secondary establishments such as the boutique to strike their employer in an attempt to force it to cease doing business with a primary party such as Fashion Manufacturers.[54] On the other hand, the Act did not affect a pure consumer boycott, such as the appeal to the young woman not to purchase Fashion Manufacturers' products.[55]

In 1959, when the Landrum-Griffin amendments were added to the National Labor Relations Act, Congress made it an unfair labor

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[52] *See, e.g.*, 78 CONG. REC. 3443 (1934) (remarks of Senator Wagner) ("Genuine collective bargaining is the only way to attain equality of bargaining power"); 29 U.S.C. § 151 (1976) (findings and declaration of policy for collective bargaining).

[53] National Labor Relations Act of 1935, 49 Stat. 449, *amended by* Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, Pub. L. No. 101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-144, 151-167, 171-183, 557 (1976)).

[54] *See* 29 U.S.C. § 158(b)(4)(B). A classic study is Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); *see also* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 U. KAN. L. REV. 651 (1971); St. Antoine, *What Makes Boycotts Secondary?* in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS—PROCEEDINGS OF THE ELEVENTH ANNUAL INSTITUTE ON LABOR LAW 5 (1965).

[55] *See* United Wholesale & Warehouse Employees Local 261 v. NLRB, 282 F.2d 824, 826 (D.C. Cir. 1960) (picketing by union against manufacturers does not necessarily induce retailer's employees to strike); NLRB v. Crowley's Milk Co., 208 F.2d 444, 446-47 (3d Cir. 1953) (proper for NLRB to order reinstatement of striking employee who engaged in secondary boycott to affect customers, not other employees).

practice for a union to "threaten, coerce, or restrain" a neutral firm to force it to stop dealing with a primary party.[56] Initially it appears that this new language was intended to cover only physical coercion or economic threats by a union directly against a secondary employer,[57] which previously would not have been reached because no work refusals by employees were involved. As a result of some rather bizarre backstage legislative maneuvers,[58] however, it developed as part of the statutory history that the phrase "threaten, coerce, or restrain" would apply to at least some types of consumer boycotts. At this point the bill's floor manager in the Senate, John Kennedy, and others became concerned about the constitutional implications of prohibiting unions from appealing to individual customers to refrain from patronizing secondary establishments.[59] They thereupon succeeded in engrafting a special proviso onto the revised boycott ban. The proviso excepted from the ban "publicity, *other than picketing,*" which advised the public that nonunion primary products were being distributed by a secondary employer.[60]

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[56] 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

[57] *See* 105 CONG. REC. 14,347, 15,532 (1959) (remarks of Representative Griffin concerning "economic retaliation," "labor trouble").

[58] *See generally* N.Y. Times, August 7, 1959, at 8, col. 6 (discussing presidential comments on secondary boycotts while Congress debated Landrum-Griffin Act). In a radio and television appeal for "an effective labor reform law" while the Landrum-Griffin Act was being debated, President Eisenhower gave the following example of a "secondary boycott" abuse: "Take another company—let us say a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, they picket the stores which sell the furniture this plant manufactures." *Id.* The illustration could well have referred to a garden variety appeal for a secondary strike by store employees. But that would have meant the President was unaware that the Taft-Hartley Act had outlawed such conduct twelve years earlier. The solution for the Landrum-Griffin sponsors was to insist that "threaten, coerce, or restrain" now covered the inducement of a secondary *consumer* boycott. *See* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 274 (1959) (discussing President's message and relation to consumer boycotts).

[59] *See* 105 CONG. REC. 16,591 (1959) (analysis of Senator Kennedy and Representative Thompson); *id.* at 17,882-83 (remarks of Senator Morse).

[60] *See* 29 U.S.C. § 158(b)(4) (1976) (emphasis supplied). Senatory Kennedy explained that under the proviso a union "can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site." 105 CONG. REC. 17,899 (1959). Although the proviso is phrased in terms of informing customers about the nonunion nature of the primary product, the legislative history establishes that nonpicketing publicity may be used to seek a buyers' boycott of the secondary business itself. Thus, Senator Kennedy said that the Senate conferees insisted on a union's right "to appeal to consumers . . . to refrain from trading with a retailer who sells such [nonunion] goods." *Id.* at 17,898; *see* Middle South Broadcasting Co., 133 N.L.R.B. 1698 (1961).

In a famous case, *NLRB v. Fruit and Vegetable Packers Local 760*,[61] universally known as *Tree Fruits*, the Supreme Court gave a narrow and rather strained reading to the new prohibitory language. A union picketed a grocery chain urging customers not to buy nonunion apples sold by the chain.[62] The pickets took pains to inform customers that they intended no general boycott of the stores themselves.[63] Since the union was concededly engaged in picketing, the publicity proviso of the secondary boycott provision was plainly inapplicable. Nevertheless, a majority of the Court held the picketing lawful.[64] The Court first rejected any negative inference from the terms of the proviso, asserting that exclusion from the proviso did not necessarily mean inclusion within the prohibition.[65] Focusing on the general prohibition itself, the Court then drew a distinction between appeals to customers not to buy one of many items carried by the stores and appeals to customers not to patronize the stores at all.[66] The limited product boycott did not "threaten, coerce, or restrain" the secondary retailer, whereas a total embargo of the chain itself would. Only the most slender legislative history, however, supported such a distinction.[67] What must have been troubling the Court was the "concern that a broad ban against peaceful picketing might collide with the guarantees of the first amendment."[68]

In a concurring opinion, blunt, forthright Justice Black took quite another tack. Concluding that Congress had intended to prohibit secondary consumer picketing of the sort at issue in *Tree Fruits*, he construed the statute as unconstitutional.[69] He stated:

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[61] 377 U.S. 58 (1964).

[62] *Id.* at 60.

[63] *Id.* at 61.

[64] *Id.* at 71-72.

[65] *Id.* at 63.

[66] *Id.* at 69-71.

[67] *See, e.g.*, 377 U.S. at 70 (discussing legislative history of Landrum-Griffin amendments). Justice Brennan, writing for the majority, derived comfort from a strategically placed conjunction — he emphasized that Senator Kennedy meant to preserve the union's "right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor *and* to refrain from trading with a retailer who sells such goods." *Id.* (quoting 105 CONG. REC. 17,898 (1959)) (emphasis the Court's). The inference was that, since the proviso regarding nonpicketing publicity protected even a total boycott of the secondary retailer, above and beyond a boycott of the primary product, the general prohibition may only have been intended to reach such a total boycott of the retailer. *But see* Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479, 500-01 (1965) (Congress never considered such differentiated categories of consumer boycotts).

[68] 377 U.S. at 63.

[69] *Id.* at 76 (Black, J., concurring).

> In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgment of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.[70]

Although Justice Black spoke pointedly about what the majority of the Court only hinted at, subsequent developments suggested that his approach might prevail. The Court was to assert that peaceful and orderly picketing, which requested only the performance of a lawful act, could not be suppressed because of the "particular views" expressed. The content of the message of such picketing would be no basis for drawing lines between the permissible and the impermissible.

The next major case, *Police Department of the City of Chicago v. Mosley*,[71] did not involve labor picketing. That fact turned out to be the key to the case. A Chicago ordinance forbade picketing next to any school while it was in session, but exempted "peaceful picketing of any school involved in a labor dispute."[72] The prohibition was challenged by a person who wished to picket in protest of alleged racial discrimination at a school.[73] The Supreme Court struck down the ordinance primarily on the basis of the equal protection clause of the fourteenth amendment (although the first amendment was "intertwined")[74] because it made "an impermissible distinction between labor and other peaceful picketing."[75] Justice Marshall, for the Court, identified the "central problem" as the classification by the ordinance of "permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign."[76] He concluded that the "First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[77] He summed up by declaring that the "essence" of "forbidden censorship" was "content

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[70] *Id.* at 79 (Black, J., concurring) (emphasis in the original).

[71] 408 U.S. 92 (1972); *see also* Carey v. Brown, 447 U.S. 455 (1980) (holding invalid state statute making it unlawful "to picket before or about the residence or dwelling of any person" but excepting "peaceful picketing of a place of employment involved in a labor dispute").

[72] 408 U.S. at 94 n.2 (quoting CHICAGO MUNI. CODE ch. 193-1(i) (1968)).

[73] *Id.* at 93.

[74] *Id.* at 95.

[75] *Id.* at 94.

[76] *Id.* at 95.

[77] *Id.*

control."[78]

Justice Marshall's statements on "content control" in *Mosley* cannot be taken at face value. As he would undoubtedly recognize, all the decisions which have found a union guilty of an unfair labor practice for instigating a forbidden secondary boycott by employees have turned on an analysis of the content of the message conveyed by the picketing or by whatever other medium was employed.[79] A more precise formulation of the "content" principle was articulated by Justice Black: peaceful, orderly picketing which solicits only lawful action cannot be forbidden because of the content of the communication.[80] Although many would have no problem accepting the further qualification that the message could also be held actionable as libel, obscenity, or the like,[81] Justice Black would disavow such a concession.[82] But even with this additional refinement of the concept, the most recent steps taken by the Supreme Court cast doubt on the continuing vitality of the notion that content-based distinctions among picketing are unconstitutional.

B. Safeco *and Beyond*

Tree Fruits, which held that the 1959 boycott amendments did not forbid consumer picketing directed against one of many primary products handled by a secondary retailer, as distinguished from picketing directed against the retailer itself, left at least two major questions unanswered. First, as a matter of statutory interpretation, would the antiboycott provisions apply to picketing of a primary product if the product constituted all or a substantial part of the secondary retailer's business even though the retailer was not made

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[78] *Id.* at 96.

[79] *E.g.*, ILA v. Allied Int'l, Inc., 102 S. Ct. 1656 (1982); IBEW Local 501 v. NLRB, 341 U.S. 694 (1951); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

[80] *See supra* note 70.

[81] *Cf.* Linn v. United Plant Guards Local 114, 383 U.S. 53 (1966) (libelous union leaflet actionable if malicious and injurious); *see also* Letter Carriers Branch 496 v. Austin, 418 U.S. 264 (1974).

[82] *Cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57 (1971) (Black, J., concurring) ("The First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false."); Smith v. California, 361 U.S. 147, 155 (1959) (Black, J., concurring) (possession of "obscene" books by bookseller is protected by first amendment); Black & Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 557-59 (1962) (libel and obscenity). For all his vigilance against limitations on speech, including picketing, on the basis of content, Justice Black strongly espoused the view that picketing is also "conduct" and "as conduct can be regulated or prohibited." Cox v. Louisiana, 379 U.S. 536, 559, 581 (1965) (Black, J., concurring in No. 24 and dissenting in No. 49).

the named target of the picketing? This would be the case, for example, if the young woman in the opening hypothetical had gone to a shoe store which handled nothing but Fashion Manufacturers' products. Second, as a matter of constitutional free speech, could a union be forbidden to engage in peaceful and orderly picketing which asked individual members of the consuming public to refrain either from purchasing a primary product under any of these circumstances or from patronizing the retailer entirely?

The Supreme Court came to grips with these issues in *NLRB v. Retail Clerks Local 1001* [*Safeco*].[83] A 6-3 majority held that picketing for the purpose of asking consumers not to buy a nonunion product which a second party was distributing was an unlawful boycott where the distributor derived ninety percent of its income from the sales of the picketed product.[84] Whatever the merits of this statutory decision, it is not dispositive of the constitutional aspects of free speech. Justice Powell, speaking for himself, Chief Justice Burger, Justice Rehnquist, and Justice Stewart, discussed this constitutional question in a single paragraph.[85] This hardly seems adequate for resolving the conundrums bequeathed us by forty years of litigation and debate over the constitutional status of picketing.

Justice Powell began with the dubious assertion that *Tree Fruits* "left no doubt that Congress may prohibit secondary picketing calculated 'to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer.' "[86] In fact, in the passage Justice Powell quoted from *Tree Fruits,* the Court was merely stating what it thought Congress had and had not done. The opinion was notably circumspect about prejudging the constitutionally allowable limits of restraints on peaceful consumer picketing. Justice Powell continued by citing one of the early Taft-Hartley employee secondary boycott cases for the proposition that a prohibition on picketing designed to further some unlawful objective did not violate the first amendment.[87] He concluded brusquely that there was no reason to retreat from that well-established understanding.[88] Nowhere in the opinion is there the slightest indication that the precedents Justice Powell relied upon were distinguishable in that they dealt with appeals for concerted employee action or action by union-

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[83] 447 U.S. 607 (1980).

[84] *Id.* at 615-16.

[85] *Id.* at 616.

[86] *See id.* (quoting NLRB v. Fruit & Vegetable Packers Local 760 [Tree Fruits], 377 U.S. 58, 63 (1964)).

[87] *Id.* (quoting IBEW Local 501 v. NLRB, 341 U.S. 694, 705 (1951)).

[88] *Id.*

ized workers presumably subject to group loyalties and discipline. Moreover, there was no reference to the fact that *Safeco* was the first time the Supreme Court had ever clearly sustained a ban on peaceful and orderly picketing addressed to, and calling for seemingly lawful responses by, individual consumers acting on their own.

Justices Blackmun and Stevens did not subscribe to Justice Powell's free speech analysis, thereby leaving the Court without a majority opinion on the constitutional question. These two Justices may be applauded for recognizing that the Powell plurality's "cursory discussion"[89] of difficult first amendment issues failed to take into account accepted precedent bearing on the constitutionality of a content-based prohibition on peaceful picketing of secondary employers.[90] Unfortunately, their own separate efforts also leave much to be desired. Both Justices Blackmun and Stevens seem willing to allow some content selectivity in restrictions on picketing despite *Mosley,* the Chicago school picketing case. Thereafter their paths diverge. Justice Blackmun winds up rather lamely: "I am reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."[91] To return once more to the opening hypothetical, was our young woman necessarily coerced when she turned away from the boutique? Where is the evidence on this crucial point?

Justice Stevens digs deeper, if ultimately to little more effect. He first emphasizes that in labor picketing it is the conduct element rather than the specific idea being expressed that is often the persuasive deterrent to potential customers.[92] Curiously, he does not specify whether the conduct element is the large sign, the stick, the physical presence of the picketer, or some combination of these factors. One might have considered the picketer the likeliest candidate, but Justice Stevens continues: "Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former *depend entirely on the persuasive force of the idea.*"[93] Since the selfsame person can obviously be either handbiller or picketer, and can glare just as ominously in one capacity as in the other, Justice Stevens seems to be abandoning the element of human confrontation and attendant psy-

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[89] *Id.* (Blackmun, J., concurring in part and concurring in result); *id.* at 618 (Stevens, J., concurring in part and concurring in result).

[90] *Id.* at 617-18.

[91] *Id.*

[92] *Id.* at 619 (Stevens, J., concurring in part and concurring in result).

[93] *Id.* (emphasis supplied).

chological pressure as the key to the conduct element in picketing. Does it then come down to the sign on a stick? If we prescind from the possible use of the stick as a weapon, and for the purposes of an article on peaceful picketing we must, it would seem improper to conclude that because the picketer's placard is more visible, and thus more effective in catching the eye in a fast moving crowd, it therefore becomes more susceptible to regulation than other forms of speech.[94]

Justice Stevens next harks back to an old distinction between a "signal" and "publicity,"[95] and stresses that the statutory ban affects the union's communication only insofar as it "calls for an automatic response to a signal, rather than a reasoned response to an idea."[96] The concept of picketing as a signal or an order, however, was developed in cases dealing with unionized workers, where the picketing was indeed like a directive to an organized group. Except in unusual circumstances, the notion of an automatic response to a signal does not square with the realities of picketing addressed to the atomized and heterogeneous membership of a pluralistic society circulating on a crowded city street. To the extent that Justice Stevens' emphasis is on an automatic response to a cryptic "Unfair," as distinct from a reasoned response to a long list of particularized grievances, I can only restate my belief that a political party's two-word bumper sticker is as much protected by the first amendment as the elaborate platform adopted at its national convention.[97]

Finally, almost as an afterthought, Justice Stevens remarks: "And the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute."[98] In some respects, this seems to be the most appealing argument of all. At first blush it is not a pure content-based rationale, but partakes more of the acceptable regula-

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[94] *See supra* note 46 and accompanying text.

[95] 447 U.S. at 619 (Stevens, J., concurring); *cf.* Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 595, 602 (1951) (discussing means by which employees may bargain with employers). According to Cox, "The constitutional decisions in picketing cases should depend, in part, on whether the "publicity" or "signal" aspect predominates . . . ." *Id.* at 595. In addition, Cox believes that "[t]he critical inquiry is whether the employees' conduct involves an appeal to an uncoerced audience each individual in which is left free to choose his own course of conduct or invokes the power of an organized combination." *Id.* at 602.

[96] 447 U.S. at 619 (Stevens, J., concurring).

[97] *Cf.* Cohen v. California, 403 U.S. 15 (1971) (protecting jacket that proclaimed "F— the Draft"). The Supreme Court has even extended first amendment protections to such nonverbal, "symbolic speech" as the wearing of black armbands to protest the Vietnam War. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 514 (1969).

[98] 447 U.S. at 619 (Stevens, J., concurring).

tion of the time, place, and manner[99] of picketing as a species of physical conduct. One can appreciate an effort to reduce the clutter and confusion of the teeming urban landscape, including the confinement of certain patrolling to certain locations. That is not, however, the real function of the secondary picketing ban. Secondary handbilling could continue at the neutral site. Picketing that would be primary as to the same establishment might proceed unimpeded. Only picketing which expresses particular views—a secondary appeal—would be restricted. This is the fatal flaw. The geographical justification, therefore, fails as well.

Perhaps the barrenness of *Safeco* as a constitutional document is best epitomized by the approach of the three dissenters, Justices Brennan, Marshall, and White. They do not even attempt to grapple with the challenge of the first amendment. Instead, they content themselves with the statutory argument that the NLRA does not forbid consumer picketing which is aimed solely at a nonunion product rather than at the neutral distributor's business as such, regardless of how large a percentage of the neutral's business is represented by the nonunion product.[100] That statutory position, however, as noted earlier, is only tangential to our central theme.

Safeco comes close to being an unreasoned decision on the issue of picketing as free speech. It is constitutional law by fiat. Because the Supreme Court has the last word on the Constitution, its fiats prevail. Yet, without a principled foundation, they tend not to endure. Up to this time, there have not been five Justices in agreement on a rationale for the constitutional proscription of peaceful secondary consumer picketing. In all probability, we have not seen the end of this debate.

Archibald Cox, while recognizing the deficiencies of the various opinions in *Safeco*, has suggested that the decision "can be fitted into the body of first amendment law if picketing is classified with commercial advertising as economic speech."[101] There is logic in that position, and if labor picketing were being classified for the first time, its bracketing with commercial utterance might not seem implausible. At this late date, however, that categorization would be out of step with the main line of both constitutional and statutory

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[99] *See supra* note 33 and accompanying text (discussing regulation of time, place, and manner of picketing).

[100] 447 U.S. at 622-24 (Brennan, J., dissenting).

[101] A. Cox, FREEDOM OF EXPRESSION 47 (1980). Professor Cox goes on to point out that the four-part test enunciated in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), "permits a content-based restriction upon commercial advertising when it 'directly advances' a 'substantial government interest' and 'is not more extensive than necessary to serve that interest.' " *Id.* at 564-66.

treatment of the activities of working people, including their appeals for support through picketing. Two years after *Thornhill v. Alabama*[102] the Supreme Court held that commercial advertising does not enjoy first amendment protections, and that remained true during the heyday of picketing as free speech.[103] It would be anomalous, at least, if the recent extension of some constitutional safeguards to commercial advertising[104] should be accompanied by their contraction in the case of union picketing.

Much more fundamentally, however, it is wrong to equate picketing by employees who seek to organize or improve their working conditions with advertising to sell soap, automobiles, or even pharmaceuticals.[105] Although its operational significance may have proved slight, section 6 of the Clayton Act is still a reminder of the pervasive congressional premise that "the labor of a human being is not a commodity or article of commerce."[106] So too, the Supreme Court has long realized through its experience with the antitrust laws, that activity in the labor market—the setting of wages, hours, and other terms and conditions of employment—must be placed on an entirely different footing from activity in the product market, that is, the commercial sale of goods and services.[107] Perhaps most

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[102] 310 U.S. 88 (1940).

[103] Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

[104] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 557, 562 (1980); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 762-63 (1976).

[105] *But see* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3424-26 (1982) (Justice Stevens, writing for the Court, seems to treat *Safeco* as a case of "economic regulation").

[106] Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 17 (1976)). I do not mean to suggest, of course, that a mere legislative classification of "human labor" would be binding on a later Congress, specifically, on the Congress that added section 8(b)(4)(ii)(B) to the NLRA in the 1959 Landrum-Griffin amendments. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(ii)(B) (1976). In my view, however, section 6 of the Clayton Act is more properly to be regarded as a congressional recognition of what I would term a "constitutional fact." By that I mean a characterization of a particular situation or state of affairs which is crucial to establishing the validity of a claim of constitutional right, and which is therefore a matter for ultimate determination by the Supreme Court and not the legislature. Ready examples of "constitutional facts" include "clear and present danger" and the "equality" or "inequality" of "separateness" in public facilities. *Cf.* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-44 (1978); Brown v. Board of Education, 347 U.S. 483 (1954); *see also* Kamisar, *Panel Discussion,* in J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980-1981 257 (1982) ("almost every constitutional holding rests on certain factual judgments or assumptions").

[107] *E.g.*, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975); Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); Apex Hosiery Co. v. Leader, 310 U.S. 469, 495, 503 (1940).

significant of all, the right of employees to form labor unions is now explicitly recognized, as it had not yet been recognized at the time of *Thornhill*, as an exercise of the freedom of assembly or association protected by the first amendment.[108] Unless there is a basic reevaluation of the status of organized labor, it is incongruous to reduce its public appeals to the level of ordinary commercial discourse.

IV. CONCLUSION

The message of this essay is alarmingly simple. Were it not so hotly controverted, presenting it would hardly seem worth the bother. My thesis is that the core of picketing is communication, and that as a means of communication, picketing is entitled to every constitutional protection afforded any other means of communication. To the extent that particular picketing may properly be subject to regulation or prohibition, it is because of elements that would similarly subject other particular communications to regulation or prohibition. To be more specific:

1. Picketing involves physical activity, just like the orator on the soapbox in the public square or the loudspeaker atop the truck on the public street. As such, picketing is of course subject to time, place, and manner regulation, including laws against violence, physical coercion, obstruction, or trespass.

2. The content of the picketer's message is also subject to regulation, as long as the usual "clear and present danger" or "incitement" standards are met. If the end sought is unlawful, the picketing may be restrained. Libel and obscenity laws should similarly apply.

3. To speak of "signals" and "automatic responses" is more conclusory than analytical. The question is, a signal, order or request to whom to do what? It is one thing for a picket line to address a group of building trades unionists approaching a construction site, and quite another to address one isolated but self-possessed young woman on a Boston sidewalk. Further, trying to distinguish between

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[108] *See* American Fed'n of State, County, & Mun. Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969) (public employees); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (public employees); *cf.* Shelton v. Tucker, 364 U.S. 479 (1960) (public school teachers' freedom of association); *see also* Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 5 (1964) ("the first amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act"); Thomas v. Collins, 323 U.S. 516, 530-32, 540 (1945) (requirement of registration before making public speech soliciting support for labor union violates rights of free speech and free assembly).

automatic and reasoned responses can be a treacherous exercise. Does the Republican or Democratic bumper sticker seek a "reasoned" response from the rock-ribbed New England Yankee or the unreconstructed Southern rebel?

To accept everything propounded in this article concerning the nature of picketing is not to resolve all the knotty problems about the legality of such substantive activities as consumer boycotts; it is only to channel the inquiry. Picketing becomes a side issue. The focus, then, becomes the other teasing questions: should there, for example, be a distinction, regardless of the means used, between seeking a concerted refusal to deal and merely inducing third parties individually not to patronize in the context of a consumer or political boycott?[109] These issues will be left for another day. At least we shall have made progress by advancing the proposition that if upper-middle-class consumer groups can freely use their natural means of communication, the media, in rallying public support, then working men and women should be no less free to use theirs, the picket line.

[109] For differing analyses of "protest boycotts" under the first amendment and the antitrust laws, compare Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659 (1978) with Note, *Protest Boycotts under the Sherman Act*, 120 U. PA. L. REV. 1131 (1980). In NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982), the Supreme Court held unconstitutional a state court's damage judgment insofar as it may have reached the nonviolent participation by civil rights groups in a boycott of white merchants aimed at desegregating a variety of public facilities.